UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AXIOM INVESTMENT ADVISORS, LLC, by and through its Trustee, Gildor Management LLC, Plaintiff, v. BARCLAYS BANK PLC and BARCLAYS CAPITAL, INC., Defendants.	Case No. 15-cv-9323-LGS

DECLARATION OF GEORGE A. ZELCS IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

Pursuant to 28 U.S.C. §1746, I, George A. Zelcs, declare:

1. I am a partner in the law firm of Korein Tillery LLC ("Korein Tillery").

2. I have been actively involved in prosecuting and resolving this action, am familiar with its proceedings, and have personal knowledge of the matters set forth herein. If called upon and sworn as a witness, I could competently testify thereto.

3. Korein Tillery, along with Scott+Scott, Attorneys at Law, LLP ("Scott+Scott"); Hausfeld LLP ("Hausfeld"); and Nussbaum Law Group, P.C. ("Nussbaum") (together, "Plaintiff's Counsel") represents Axiom Investment Advisors, LLC, by and through its Trustee, Gildor Management, LLC ("Plaintiff").[1]

[1] Unless otherwise defined herein, all capitalized terms have the meaning ascribed to them in the Amended Stipulation and Agreement of Settlement with Barclays Bank PLC and Barclays Capital Inc. ("Amended Settlement Agreement") (Dkt. 64, Ex. 1).

4. On April 21, 2016, this Court entered in this matter an Order Preliminarily Approving Settlement, Conditionally Certifying the Settlement Class, and Appointing Class Counsel and Class Representative for the Settlement Class. ECF No. 65. In that order, this Court appointed Christopher M. Burke of Scott+Scott and George A. Zelcs of Korein Tillery as Class Counsel for the Settlement Class.

5. I submit this declaration in support of the Motion for Final Approval of a Settlement with Barclays Bank PLC and Barclays Capital, Inc. (collectively, "Barclays," and together with Plaintiff, the "Parties"), and in support of Plaintiff's Counsel's Motion for Attorneys' Fees and Reimbursement of Expenses. If approved, the Settlement set forth in the Amended Stipulation and Agreement of Settlement ("Amended Settlement Agreement") will provide a significant recovery for the proposed settlement class including, among other things, Barclays' payment of $50,000,000 in cash and its agreement to provide information that Plaintiff's Counsel believe will assist in pursuing claims against other banks that engaged in similar "Last Look" practices and will resolve this complex class action.

6. Because this declaration is submitted in support of a settlement, it is inadmissible in any subsequent proceedings, other than in connection with the Settlement. In the event the Amended Settlement Agreement is not approved by the Court, this declaration and the statements contained herein are without prejudice to Plaintiff's position on the merits of this Action.

I. SUMMARY OF CLAIMS AND THE PROCEDURAL HISTORY OF THE LITIGATION

7. On November 25, 2015, Plaintiff filed *Axiom Investment Advisors, LLC v. Barclays Bank PLC*, Case No. 15-cv-9323. The Complaint was based on Plaintiff's Counsel's preceding 18-month investigation. *See* §II., *infra*.

8. Approximately a week earlier, on November 18, 2015, Barclays entered into a Consent Order with the New York Department of Financial Services ("NYDFS"), admitting to certain internal controls failings; agreeing to pay a $150 million civil monetary penalty; agreeing to terminate a Managing Director and Global Head of Electronic Fixed Income, Currencies, and Commodities Automated Flow Trading; and agreeing to work with an independent monitor on remediation. *In the Matter of Barclays Bank PLC, Barclays Bank, PLC, New York Branch*, Consent Order Under New York Banking Law §44 (Nov. 18, 2015) (available at www.dfs.ny.gov/about/ea/ea15117.pdf).

9. The Complaint alleges that Plaintiff and members of the class placed electronic orders for foreign exchange ("FX") trades via Barclays' proprietary electronic trading platform (known as BARX) and through multi-dealer electronic trading platforms (known as "Electronic Communications Networks," or "ECNs") (such as Currenex, Hotspot, and FXall). Complaint, ¶3. As alleged in the Complaint, Barclays streamed prices into these systems, and its customers placed orders by hitting a price Barclays was showing. *Id.*, ¶¶33-35, 40. The Complaint alleges that these orders constituted offers to transact at the best, immediately available prices and, at the same time, operated as an acceptance of Barclays' outstanding unilateral offer to trade. *Id.*, ¶¶3, 99, 106. The Complaint alleges, however, that many times Plaintiff and the members of the class did not receive the agreed-on contract price (*i.e.*, the best, immediately available price). *Id.*, ¶4. The Complaint further alleges that Barclays delayed the execution of matched trades, and when it determined during the delay that the trade would be unfavorable to its position or that it could extract a larger profit, it reneged on the agreed-on price *Id.*, ¶¶4, 45-53. This practice is called "Last Look," and Plaintiff alleges that Barclays' Last Look practices caused Barclays, among other things, to breach its contracts with Plaintiff and class members. *Id.*, ¶¶4, 5, 99-115.

Plaintiff further alleges that by promoting its prices as "executable" when they were not, Barclays has unfairly deceived Plaintiff and class members and caused significant damages to Plaintiff and the class while unjustly enriching Barclays. *Id.*, ¶¶5, 119-44.

10. On January 7, 2016, the Court held an initial pretrial conference during which Plaintiff's Counsel publicly disclosed a settlement in principle resolving this Action, and the Court set a briefing and hearing schedule for Plaintiff's motion for preliminary approval of the settlement, adjourned the time for Barclays to answer the Complaint, and stayed discovery pending further order of the Court. ECF No. 28.

11. On April 21, 2016, this Court entered in this matter an Order Preliminarily Approving Settlement, Conditionally Certifying the Settlement Class, and Appointing Class Counsel and Class Representative for the Settlement Class. ECF No. 65.

12. On November 17, 2016, this Court entered an Order Approving the Form and Manner of Notice of the Settlement and Preliminarily Approving the Plan of Distribution. ECF No. 97.

13. On February 28, 2017, Plaintiff and Lead Counsel filed a Motion for Final Approval of the Settlement and a Motion for Attorneys' Fees, Reimbursement of Expenses, and a Service Award.

14. This Court has set the Final Fairness Hearing for July 18, 2017.

II. SUMMARY OF PRE-SUIT INVESTIGATION

15. Plaintiff's Counsel's pre-suit investigation of the facts underlying this matter began as early as March 2014 when certain members of Plaintiff's Counsel were investigating the FX market as part of their prosecution of the claims asserted in *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13-cv-7789 (S.D.N.Y.).

16. In the course of those investigations, Plaintiff's Counsel uncovered a pattern of high reject rates and low fill rates of purportedly executable trades by banks on electronic FX trading platforms. Plaintiff's Counsel's investigation turned to determining the scope of this behavior, including whether the practice was used on single-dealer platforms (like BARX) and/or multi-dealer ECNs (like Currenex, Hotspot, and FXall). Plaintiff's Counsel, among other things, interviewed numerous FX traders and market experts and examined publicly available documentation to determine whether the Last Look practice was disclosed.

17. Plaintiff's Counsel also worked with economic and damages experts in order to understand the impact Barclays' Last Look practices had on class members and their estimated damages.

18. During the pre-filing investigation, Plaintiff's Counsel informed the NYDFS about Barclays' Last Look practices. The NYDFS, as described in §I, *supra*, conducted a parallel investigation into Barclays' Last Look practices. Plaintiff's Counsel met with NYDFS attorneys and economists to discuss Last Look practices and shared a draft complaint.

19. Once the NYDFS entered its consent order with Barclays, Plaintiff's Counsel immediately filed the Action.

III. SUMMARY OF THE SETTLEMENT NEGOTIATIONS

20. The Settlement set forth in the Amended Settlement Agreement was reached under the guidance and with the assistance of a well-respected mediator, Kenneth R. Feinberg. The Amended Settlement Agreement was the product of hard-fought, arm's-length negotiations by counsel highly experienced in complex litigation. Barclays was represented by Sullivan & Cromwell LLP ("Barclays' Counsel"). Plaintiff was represented by myself; Christopher M. Burke of Scott+Scott; Michael D. Hausfeld of Hausfeld; and Linda Nussbaum of Nussbaum.

21. In early 2015, Plaintiff's Counsel informed Barclays' Counsel that it was engaged in a substantive pre-suit investigation relating to Barclays' Last Look conduct.

22. After these discussions, Barclays' Counsel began the discussion of resolving these claims in early 2015.

23. On April 20, 2015, Plaintiff's Counsel and Barclays' Counsel engaged in a supervised mediation with Mr. Feinberg and reached an agreement on the framework of a settlement. Plaintiff's Counsel engaged in extensive consultation with experts before the Parties were able to agree to a settlement framework.

24. Over the course of negotiations during the following months, Plaintiff's Counsel received certain confirmatory discovery, including information about, among other things, Barclays' Last Look practices and industry practices generally.

25. By October 29, 2015, negotiations had progressed to the point that the Parties executed a term sheet.

26. The Parties continued to exchange information and at the same time negotiate the terms of a long-form settlement agreement. On February 10, 2016, the Parties executed the Stipulation and Agreement of Settlement with Barclays Bank PLC and Barclays Capital Inc., and on April 20, 2016 they executed the Amended Settlement Agreement, which is attached as Exhibit 1.

IV. SUMMARY OF THE SETTLEMENT TERMS

27. The Amended Settlement Agreement provides for $50,000,000 in monetary relief, and the provision of extensive confirmatory discovery and cooperation obligations from Barclays, which Plaintiff's Counsel believe will assist in pursuing claims against other banks that

engaged in similar practices. All funds are non-reversionary if there is final approval of the Amended Settlement Agreement by the Court. Amended Settlement Agreement, ¶10(j).

28. The "Class" consists of "[a]ll persons who, between June 1, 2008 and the date of preliminary approval of the settlement (the "Class Period"), submitted a trade or trade instruction for an FX Instrument to Barclays over BARX (whether submitted on BARX or via an ECN or any other connection to BARX) to which Barclays applied Last Look, or as to which Barclays engaged in any other conduct that is the subject of a Released Claim and who were either (i) domiciled in the United States, or (ii) (a) domiciled outside the United States and (b) had such trade or trade instruction routed over a Barclays server in the United States." Amended Settlement Agreement, ¶3(a)(i).[2]

29. Barclays has identified 1,373 potential members of the Class using available records. It is difficult to predict claims volume and the settlement fund subscription rate at this time, but Authorized Claimants are likely to receive significant monetary compensation.

A. Confirmatory Discovery and Cooperation Obligations

30. Barclays' provision of confirmatory discovery and the cooperation obligations have assisted in the prosecution of the Action, including the development of the Plan of Distribution, which, if approved, provides the formulas for the distribution of the Net Settlement to Authorized Claimants. In addition, Plaintiff's Counsel expect that Barclays' further provision of cooperation under the Amended Settlement Agreement will assist in further understanding the electronic trading market for FX and in prosecuting Last Look claims against banks that engaged

[2] Specifically excluded from this Class are Barclays and any Platform; the officers, directors, or employees of Barclays or a Platform; any entity in which Barclays or a Platform has a controlling interest; any affiliate, legal representative, heir, or assign of Barclays or a Platform and any person acting on its behalf. Also excluded from this Class are any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action. Amended Settlement Agreement, ¶3(a)(i).

similar practices. Plaintiff's Counsel further believe this will apply pressure on banks that are defendants in other Last Look actions to consider engaging in settlement discussions. Based on information known to date, Plaintiff's Counsel believe there is substantial overlap between the Class in this Action and class members in similar actions against other banks. Access to Barclays' transaction data will also permit Plaintiff's experts to assess factual and legal class certification and damages issues that may arise in similar actions against other banks.

31. The scope of Barclays' confirmatory discovery and cooperation obligations mirror the scope of the release. A summary of Barclays' cooperation is as follows:

32. ***Attorney Proffers***: Barclays agreed to attorney proffers covering the following topics: (1) a general description of FX E-Trading, including the market participants that offer FX E-Trading platforms and the features and practices of those platforms, to the extent known by Barclays; (2) a description of the facts relevant to any and all Released Claims, including but not limited to any code or logic similar to Last Look; (3) the features and practices of Platforms offered by other market participants, including the use of any code or logic similar to Last Look, to the extent known by Barclays; and (4) to the extent not prohibited by any law, regulation, policy, or other rule of any governmental body protecting disclosure of such information, the identity and last known contact information of all current and former officers, directors, and employees of Barclays who already have been interviewed by any United States or European country governmental body (and specifically excluding any third-party and/or independent consultant engaged at the direction of such governmental body) investigating conduct in, or affecting, FX E-Trading, including Last Look. Barclays will also respond, and has responded, to reasonable follow-up inquiries of Plaintiff's Counsel for further attorney proffers. Amended Settlement Agreement, ¶13(d)(ii).

33. ***Production of Transaction Data***: Barclays produced transaction data for nearly 80 million trades. Amended Settlement Agreement, ¶13(d)(iii).

34. ***Production of Documents Produced to Governmental Bodies***: Barclays produced the documents (*i.e.* electronic communications such as e-mails and chats) that it has already produced or made available to any grand jury or United States or European country governmental body (and specifically excluding any third-party and/or independent consultant engaged at the direction of such governmental body) investigating FX E-Trading, including but not limited to Last Look. Amended Settlement Agreement, ¶13(d)(iv). In sum, Barclays produced 65,142 documents, consisting of 279,094 pages.

35. ***Production of Additional Documents and Data***: Barclays agreed to meet and confer over any reasonable requests by Plaintiff for additional documents and data. Amended Settlement Agreement, ¶13(d)(v).

36. ***Interviews***: Barclays agreed to use its reasonable best efforts to make available for interviews with Plaintiff's Counsel and/or their experts no more than three (3) current Barclays employees designated by Plaintiff's Counsel. Each interview will take place on a single day and will not exceed eight hours. The interviews will not be videotaped, recorded, or professionally transcribed. Barclays will also respond to reasonable follow-up inquiries of Plaintiff's Counsel. At Plaintiff's Counsel's request, and for good cause, Barclays will meet and confer regarding no more than two (2) additional interviews of current Barclays employees sought by Plaintiff's Counsel, but failing agreement between the Parties, the Parties will seek resolution of such disputes from the Mediator. Amended Settlement Agreement, ¶13(d)(vi).

37. Barclays' cooperation has already benefited the class in prosecuting this Action and in investigating and prosecuting similar claims against other liquidity providers, and Barclays' obligations continue until at least April 21, 2020.

B. Release of Claims

38. In consideration for Barclays' payment of $50,000,000 to the Class and its provision of cooperation and confirmatory discovery, and upon the Effective Date of the Settlement, Plaintiff and Releasing Parties who do not exclude themselves from the Class will give up any rights to sue Barclays or any of the Released Parties for the Released Claims. Amended Settlement Agreement, ¶¶1, 2(kk).

39. The release is limited to only those claims "arising from or relating in any way to any conduct alleged or that could have been alleged in and arising from the factual predicate of the Action." Amended Settlement Agreement, ¶¶ 2(kk).

40. The release carves out claims arising under foreign laws where, based upon orders or trades either in or over BARX (whether placed directly or indirectly via an ECN, or via any other connection to BARX) that used a Barclays server solely outside the United States and belonging to any Releasing Party that is domiciled outside the United States or Person that is domiciled outside the United States, as well as claims brought by plaintiffs in *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, No. 13-cv-7789 (S.D.N.Y.). Amended Settlement Agreement, ¶2(kk).

41. The Amended Settlement Agreement defines Released Claims as:

> any and all manner of claims, including "Unknown Claims" as defined below, causes of action, cross-claims, counter-claims, charges, liabilities, demands, judgments, suits, obligations, debts, setoffs, rights of recovery, or liabilities for any obligations of any kind whatsoever (however denominated), whether class or individual, in law or equity or arising under constitution, statute, regulation, ordinance, contract, or otherwise in nature, for fees, costs, penalties, fines, debts,

> expenses, attorneys' fees, and damages, whenever incurred, and liabilities of any nature whatsoever (including joint and several), known or unknown, suspected or unsuspected, asserted or unasserted, arising from or related to any of the factual predicates of the Action, or any amended complaint or pleading therein, from the beginning of time until the date of the preliminary approval of the settlement, specifically including but not limited to: (i) Barclays' application of Last Look to trades or trade instructions for FX Instruments submitted to Barclays over BARX (whether submitted on BARX or via an ECN or any other connection to BARX) that resulted in delayed or rejected trades or trade instructions; (ii) Barclays' use of information obtained through Last Look, including, but not limited to, for pricing or trading purposes; (iii) Barclays' application of any other rule, process, functionality, procedure, format, file, algorithm, programming, code, logic or method associated with BARX to trades or trade instructions for FX Instruments submitted to Barclays over BARX (whether submitted on BARX or via an ECN or any other connection to BARX) that delays, modifies, alters, rejects, prevents or in any way affects the execution or pricing of an order or trade instruction; or (iv) Barclays' representations or omissions relating to the foregoing. Provided however, Released Claims do not include (i) claims brought by plaintiffs in *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, No. 13-cv-7789 (S.D.N.Y.); or (ii) claims arising under foreign laws based upon trades or trade instructions for FX Instruments submitted to Barclays over BARX (whether submitted on BARX or via an ECN or any other connection to BARX) where that trade or trade instruction used a Barclays server solely outside the United States and belonging to any Releasing Party that is domiciled outside the United States or Person that is domiciled outside the United States.

Amended Settlement Agreement, ¶2 (kk).

V. DEVELOPING THE PLAN OF DISTRIBUTION AND IMPLEMENTING NOTICE

42. Developing the Plan of Distribution required Plaintiff's Counsel and their experts to process and analyze nearly 80 million transactions produced by Barclays. These transactions took place on multiple platforms, involved 126 currency pairs, multiple different transaction types, and over a time period of many years. Plaintiff's Counsel requested numerous and frequent proffers from Barclays regarding data interpretation issues and also conducted document review to assist the experts in data interpretation for purposes of developing the Plan of Distribution.

43. At various times after this Court entered its Order Preliminarily Approving the Settlement, Plaintiff's Counsel encountered challenges with the data that required Plaintiff's Counsel and its experts to expend significant time and resources to develop and refine the Plan of Distribution.

44. Plaintiff's Counsel also spent considerable time and expense reviewing a significant portion of the 62,158 documents (comprising 279,094 pages) produced by Barclays. Plaintiff's Counsel did so in order to answer various expert questions throughout the development of the Plan of Distribution, and in conducting confirmation discovery relating to the Settlement of the Action.

45. Because the Settlement covered U.S.-based trades of foreign class members, Plaintiff's Counsel also had to analyze the implications of foreign privacy and bank secrecy laws on the class action notice plan, and work with Barclays to devise and implement a method of providing adequate notice to non U.S.-domiciled class members in a way that would not run afoul of foreign privacy and bank secrecy laws.

VI. CLASS REPRESENTATIVE'S INVOLVEMENT IN THE LITIGATION

46. Plaintiff is the only Named Plaintiff in this Action. Its principal, Ephraim Gildor ("Gildor"), assisted Plaintiff's Counsel throughout the course of this case. Indeed, Gildor's contributions, along with those of other former Axiom executives, including Kathleen Hartmann and José Scheinkman, have been invaluable because of their industry knowledge.

47. Gildor and other former Axiom executives also revived Axiom through a Trusteeship established by a 2016 order of the Delaware Court of Chancery. The entity was revived for the primary purpose of pursuing claims in this Action.

VII. EXHIBITS

48. Attached hereto as Exhibit 1 is a true and correct copy of Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees and Expenses in Class Action Settlements: 1993-2008*, 7 Empirical Legal Stud. 248 (2010).

49. Attached hereto as Exhibit 2 is a true and correct copy of Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010).

50. Attached hereto as Exhibit 3 is a true and correct copy of Theodore Eisenberg, Geoffrey P. Miller, & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, Law & Economics Research Paper Series, Working Paper No. 17-02 (Dec. 2016).

51. Attached hereto as Exhibit 4 is a true and correct copy of the Declaration of Professor Miller in Support of Plaintiff's Counsel's Fee Request.

52. Attached hereto as Exhibit 5 is a true and correct copy of the Declaration of Professor Fitzpatrick in Support of Plaintiff's Counsel's fee.

53. Attached hereto as Exhibit 6 is a true and correct copy of the Declaration of Charles Silver on the Reasonableness of Plaintiffs' Counsel's Request for Attorney's Fees.

VIII. CONCLUSION

54. For the reasons set forth herein, in the Memorandum of Law in Support of Plaintiff's Motion for Final Approval, and in the documents filed in support thereof, I believe the settlement is fair, reasonable, and adequate. I also believe, for the reasons set forth herein and in the Memorandum of Law in Support of Plaintiff's Counsel's Motion for Attorneys' Fees and Reimbursement of Expenses, that the requested fee, expense reimbursement, and service award is reasonable. As such, I believe that the Court should grant the Motion for Final Approval and the Motion for Attorneys' Fees and Reimbursement of Expenses.

I certify under penalty of perjury that the foregoing is true and correct. Executed on February 28, 2017, in Chicago, Illinois.

George A. Zelcs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 28, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List, and I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

/s/ George A. Zelcs

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